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The Reemergence of the "State Action" Requirement in Race Relations Cases

William Bassett*

Little did knowledgeable legal observers imagine, after the Supreme Court's hallmark ruling in *Jones v. Mayer Co.*,¹ that, within four years, the concept of state action would undergo as extensive a transitional development as it has. Yet, since *Jones* was decided in 1968, the Court has accomplished a complete turn-about in its interpretation of state action in race relations cases. It is most unlikely, indeed, that a reader of *Jones* could have imagined that *Adickes v. S.H. Kress Co.*² and *Moose Lodge v. Irvis*³ would follow shortly.

In *Jones*, the cause of action was the refusal of a state-licensed real estate broker to sell a home to a black couple. The lower court dismissed the action on a finding of no state action. Yet in a 7-2 decision, the Supreme Court held that the 1866 Civil Rights Act provides a remedy under 42 U.S.C. § 1982 that does not depend, for its effectiveness, on a finding of state action. The Act, the Court held, outlaws all acts of discrimination, whether they be public or private. Any discriminatory action was the very vestige, the very badge, and the very incident of slavery that the thirteenth amendment was enacted to abolish. Section 1982 contains no exemptions for sales of private homes; in fact, it contains no contractual exemptions whatsoever. In short, *Jones* combined the thirteenth amendment and its enabling power with the century-old Civil Rights Act to produce a comprehensive anti-discriminatory package under the doctrine of substantive equality of all citizens to enter any contractual transaction. The point is simply that

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1. 392 U.S. 409 (1968).

2. 398 U.S. 144 (1970).

3. 92 S. Ct. 1965 (1972).

Jones rejected the need to find state action where the constitution or any federal law was violated.

Less than two years later, however, in *Adickes* the Court construed the same post-Civil War statute under § 1983 to require a finding of state action. While serving as a volunteer teacher for black children in Mississippi, Sandra Adickes, a white woman from New York, entered a restaurant with six of her students for the purpose of eating lunch. A waitress, under instructions from the restaurant manager, took the students' orders, but refused to serve Miss Adickes because she was in the company of blacks. Leaving the restaurant, the teacher was arrested by local police on a charge of vagrancy. The case was not brought under the Civil Rights Act of 1964, which, though it covered restaurants and most places of public accommodation,⁴ was limited to offering injunctive relief, rather, it was brought under § 1983, which provides a civil remedy for damages. Adickes alleged that the restaurant's refusal to serve her violated her right, under the equal protection clause of the fourteenth amendment, not to be discriminated against on the basis of race. A directed verdict in favor of Miss Adickes resulted, both on the district and appellate levels. Rejecting an entire line of cases, the Supreme Court held that an action to rectify a violation of civil rights required at least minimal state involvement to trigger the equal protection clause.

To many observers, the reassertion of the state action concept in *Adickes* was little more than a temporary setback in the distinctly American quest for freedom in justice. However, the Court's most recent decision on race relations, *Moose Lodge v. Irvis*, has dispelled all doubts. State action is here to stay.

K. Leroy Irvis, Speaker of the Pennsylvania State House and a black man, was refused service in the dining room of Moose Lodge No. 107, a fraternal organization in Harrisburg. The federal district court for the Middle District of Pennsylvania held that the equal protection clause barred the State Liquor Control Board's issuance of a liquor license to a fraternal lodge that, in the constitution of its supreme lodge, denied membership to non-whites. Indeed, the court posited, the very retention of a liquor license required that all persons be served. Finally, the court concluded that the discrimination by the local chapter of the Moose bore the attributes of state action to such an extent that it fell within the prohibition of the equal protection clause.

On appeal, the Supreme Court, by a 6-3 vote, overturned the lower court's opinion. Speaking for the Court, Mr. Justice Rehnquist viewed the total factual situation and found the lodge to be "a private club in the ordi-

4. Title II, §§ 201-207, 42 U.S.C. §§ 2000a *et seq.* (1970).

nary meaning of the term."⁵ While conceding that "the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination," the Court argued that the mere issuance of a liquor license was not enough to bring the lodge within state action requirements.

Viewed together, *Adickes* and *Moose Lodge* represent a substantial shift in Supreme Court standards. Dissenting in *Adickes*, Mr. Justice Douglas deplored the continuing preoccupation of the Court with the search for state involvement in racial discrimination cases. "It is time," he wrote,

we stopped being niggardly in construing civil rights legislation. It is time we kept up with Congress and construed its laws in the full amplitude needed to rid their enforcement of the lingering tolerance for racial discrimination that we sanction today.⁶

In contrast to the promise of freedom of *Jones*, *Adickes* and *Moose Lodge* represent a step backwards. How far backwards, however, is problematic. Value judgments upon a long line of federal and state precedents spanning almost a century must necessarily be conditioned and relative.

*Strict Constructionism and the Narrowing Line:
Seventy Years of Restrictive Interpretation*

The modern law of race relations may justly be considered to have begun in 1954 with the school integration decision in *Brown v. Board of Education*.⁷ Since that time, the civil rights movement has penetrated every facet of a growing national concern for civil, political, and social justice. In response to the harsh reality of centuries of official encouragement and toleration of the grossest inequities, courts have progressed in their expansion of the principle of freedom over this decade and a half in a way that truly represents a legal revolution. The arrival of *Adickes* and *Moose Lodge*, perhaps only a momentary pause for judicial reflection, could present a substantial obstacle to a full realization of the goals of the revolution.

While *Jones* and *Adickes* supplied the case reporters with pages of Congressional debate on the Civil Rights Acts of 1866 and 1871,⁸ this article

5. 92 S. Ct. at 1970.

6. 398 U.S. at 188.

7. See Larson, *The New Law of Race Relations*, 1969 Wisc. L. Rev. 470, 471 [hereinafter cited as Larson].

8. The Civil Rights Act of 1866 was essentially re-enacted after the adoption of the thirteenth, fourteenth and fifteenth amendments in three Acts aimed at quelling Southern resistance to their implementation. Termed the Enforcement Act, the Force Act, and the Ku Klux Klan Act, the statutes were: Act of May 31, 1870, 16 Stat. 140; Act of Feb. 28, 1871, 16 Stat. 933; Act of April 20, 1871, 17 Stat. 13. Codification of these statutes was provided in sections 5506-5532 of the Revised Statutes

will go directly to the judicial decisions themselves in the conviction that they are more productive of insight than the Congressional discussion of a hundred years ago.⁹

The 1883 *Civil Rights Cases*¹⁰ are generally taken as the starting point for analysis of two distinct propositions: whether Congress is constitutionally invested with the power to legislate directly against private acts of racial discrimination by § 5 of the fourteenth amendment;¹¹ and whether the self-executing clause, § 1,¹² of the amendment is a prohibition solely against state action.

Five cases of discrimination against blacks in hotels, restaurants, theaters, places of public amusement, and transportation were brought to the Supreme Court under the Civil Rights Act of 1875.¹³ The Act was struck down as unconstitutional; no cause of action was found; the fourteenth amendment was declared to be no shield against purely private action; and a veritable anthology of dicta was recorded in Justice Bradley's restrictive majority opinion to chill generations of subsequent litigants trying to bring an action to secure constitutional rights under the thirteenth, fourteenth and fifteenth amendments.

(1875). This Reconstruction legislation, though considerably modified over the years, still forms the basis of federal statutory civil rights law. See, e.g. 18 U.S.C. §§ 241, 242; 42 U.S.C. §§ 1971-89; 28 U.S.C. §§ 1343, 1443 (1964).

9. For historical studies in review of the Acts and Amendments following the Civil War see JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1965); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964). Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 99-122; Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Black, *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967); Note: *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969); Note: *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1448 (1965). For case analyses, see LOCKHART, KAMISAR, CHOPER, CONSTITUTIONAL LAW, 1276 (2d ed. 1967); FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW 971, 1250 (3rd ed. 1967). Extended statutory and case commentary can also be found in EMERSON, HABER & DORSEN, 2 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES II (1967) (1969 Supp.).

10. 109 U.S. 3 (1883).

11. "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

12. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

13. 18 Stat. 335 (1875). The Civil Rights Acts of 1866, 1870 and 1871 were not in contest. The Act of 1875 was a public accommodations statute. See Avins, *The*

Under the fourteenth amendment, Justice Bradley held that Congress has no power to legislate against private wrongs. Congressional legislation must be directed to relief from the actions of the States:¹⁴

It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation. . . . It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges. . . .

Furthermore, Bradley held that to conceive of barring blacks from restaurants and places of public accommodation as a vestige of slavery was to run the slavery-abolition concept into the ground. This attitude, of course, paved the way for the separate-but-equal doctrine of *Plessy v. Ferguson*,¹⁵ where racial segregation in public transportation did not violate the equal protection clause of the fourteenth amendment. Thus, the significant restriction of those privileges and immunities that fell within the scope of the fourteenth amendment, announced in *the Slaughter House Cases* in 1873,¹⁶

Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations, 66 COL. L. REV. 873 (1966).

14. 109 U.S. 3, 11 (1883). This principle is succinctly expressed in *Love v. Chandler*, 124 F.2d 785 (8th Cir. 1942) and in the Supreme Court in *Collins v. Hardyman*, 341 U.S. 651 (1951): "The statutes [civil rights acts], while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States, did not have the effect of taking into federal control the protection of private rights against invasion by individuals." *Love* at 786. In *Jones*, *supra* note 1, the Court noted the opinion of Bradley in *The Civil Rights Cases* regarding the unconstitutionality of the Act of 1875, but did not pass on its continued validity, holding the question academic since the Civil Rights Act of 1964. The Court did observe, however, that all its members were in agreement that Congress could outlaw private acts of discrimination. *United States v. Price*, 383 U.S. 787 (1966) and *United States v. Guest*, 383 U.S. 745 (1966) both hold that Congress can use its legislative authority under Section 5 of the fourteenth amendment to make conduct illegal, even though that same conduct would not be unconstitutional under the amendment as a self-executing provision. Both cases involve criminal prosecution under statutes which are the criminal counterparts of 42 U.S.C. §§ 1981, 1982, and 1983 (1964). Although the Justices differed in their opinions, the majority clearly found that Congress was enabled to reach private acts under the fourteenth amendment, although exclusively private acts are not unconstitutional under the fourteenth amendment considered as a self-executing provision. Thus, in the Civil Rights Acts of 1964, Congress could abolish all reference to the involvement of interstate commerce or the presence of state action.

15. 163 U.S. 537 (1896).

16. 83 U.S. (16 Wall.) 36 (1873). But in *Strauder v. Virginia*, 100 U.S. 303 (1879), a state law excluding Negroes from jury duty was declared unconstitutional.

was further narrowed to avoid application also of the thirteenth amendment.¹⁷

The first Mr. Justice Harlan objected strenuously to the majority holding in *The Civil Rights Cases* in a classic dissent, urging that the Court's decision had emasculated the noble effort to "prevent any class of human beings in this nation from ever being subject to another class."¹⁸ He maintained that Congress did, indeed, have the power to legislate in prohibition of all acts of racial discrimination. Moreover, he noted that:

In every material sense . . . railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable . . . to governmental regulation. . . . [W]ithin the principle settled in *Ex parte Virginia*, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left . . . practically at the mercy of corporations and individuals wielding power under the States. . . .¹⁹

The bitter legacy of racial exploitation following these cases bears out the realism of Harlan's dire admonition.²⁰

It should be noted that *Prigg v. Pennsylvania*,²¹ sustaining the constitutionality of the Fugitive Slave Act of 1782, was not even discussed in *The Civil Rights Cases*. In *Prigg*, Mr. Justice Story maintained that:

If, indeed, the Constitution guarantees the right, and if it requires the delivery upon a claim of the owner . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given. . . .²²

17. Larson, *supra* note 3, at 487.

18. 103 U.S. 3, 62 (1883).

19. *Id.* at 58-59. Harlan cited many cases in support of his contention that public function and governmental regulation are sufficient grounds to find state action. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344, 848 (1848); *Olcott v. Sup'rs.*, 83 U.S. (16 Wall.) 678 (1872) (public conveyances on land and water); *Rex v. Ivens*, 7 Car. & P. 213 (32 E.C.L. 495) (inns and restaurants).

20. Professor Charles Black believes that the proposition that the state was responsible only for discriminatory injury directly and exclusively inflicted by its own acts reflected a reluctance on the part of the members of the Court to know as Justices what they knew as men: that there are no meaningful lines between that which the state tolerates, that which it encourages, and that which it effects. Black, *Forward: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967).

21. 41 U.S. (17 Pet.) 539 (1842).

22. *Id.* at 614-15.

Moreover, where the States are unable to protect civil rights, Congress can reach private discriminatory action.²³ The federal courts had accepted many of these cases between 1870 and 1880.²⁴ While these cases stand for the proposition that Congress can act against private racial criminality, they were not followed in *The Civil Rights Cases*.

The crucial test of the fifteenth amendment came in *United States v. Cruikshank*,²⁵ where a mob of more than a hundred whites had been indicted for attacking and killing blacks who had attended a political rally in Louisiana. Here Justice Bradley discussed the *Prigg* decision, conceding that "Congress has power to enforce, by appropriate legislation, every right given or guaranteed by the Constitution."²⁶ "The method of enforcement," the Court said, "will depend on the character of the right conferred."²⁷ In his decision, Bradley distinguished the fifteenth from the fourteenth amendment:

The real difficulty in the present case is to determine whether the amendment has given congress any power to legislate except to furnish redress in cases where the states violate the amendment. Considering . . . that the amendment . . . substantially guaranties the equal right to vote to citizens of every race and color, . . . congress has the power to secure the right not only against the unfriendly operations of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of state laws.²⁸

The case was dismissed, however, for failure to prove racial motivation in the crime. Regarding the fourteenth amendment, Bradley was less liberal in his construction:

With regard to those acknowledged rights and privileges of the citizen . . . they belong to him as his birthright, and it is the duty of the particular state of which he is a citizen to protect and enforce them . . . (w)hen any of these rights and privileges are secured in the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guaranties that they shall not be impaired by the states or the United States The affirmative enforcement of the rights and privileges themselves,

23. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1359-60 (1964).

24. *United States v. Given*, 25 F. Cas. 1324, 1325-26 (No. 15, 210) (C.C.D. Del. 1873); *United States v. Hall*, 26 F. Cas. 79, 81-82 (No. 15, 282) (C.C.S.D. Ala. 1871); *United States v. Crosby*, 25 F. Cas. 701 (No. 14, 893) (C.C.D. S.C. 1871).

25. 25 F. Cas. 707 (14,897) (C.C.D. La. 1874).

26. *Id.* at 710.

27. *Id.*

28. *Id.* at 713.

unless something more is expressed, does not devolve upon it [the United States], but belongs to the state government as a part of its residuary sovereignty.²⁹

This restrictive construction, built upon a theory of state sovereignty and federalism and conditioned by an apprehension of a federal criminal code, was to prevail.³⁰ Even so, in *Ex parte Yarbrough*,³¹ the Court held the power of the federal government to reach racially motivated infringement of the right to vote valid under the fifteenth amendment.

The mood of the Court changed at an imperceptible rate. In *Williams v. Mississippi*,³² it was held that a state plan to legalize white supremacy as the basis of Mississippi's political institutions did not violate the fifteenth amendment. And, in *James v. Bowman*,³³ the Court, failing even to mention *Yarbrough*, found that state action was required to bring an action under both the fourteenth and fifteenth amendments. The state action requirement under the fifteenth amendment was finally discarded in 1953 in *Terry v. Adams*.³⁴

The need for a finding of positive state action in racial discrimination cases, however, is well-established. *Buchanan v. Warley*³⁵ struck down a city zoning ordinance enforcing integration in Louisville. *Yick Wo v. Hopkins*³⁶ found the discriminatory administration of a San Francisco fire ordinance by city officials to be constitutionally reprehensible interference with the rights of Chinese-Americans.

Yet, purely private discrimination was untouched in *Hodges v. United States*.³⁷ There a group of whites had terrorized Negroes at a mine and their

29. *Id.* at 710.

30. In the companion case, *United States v. Reese*, 92 U.S. 214 (1875), the same reasoning prevailed. Chief Justice Waite said Congress could proscribe only state action under the fourteenth amendment, but reach private activities under the fifteenth. 92 U.S. at 217-18.

31. 110 U.S. 651 (1884). The fifteenth amendment, the Court held, "does, *proprio vigore*, substantially confer on the [N]egro the right to vote, and Congress has the power to protect and enforce that right." 110 U.S. at 665.

32. 170 U.S. 213 (1898).

33. 190 U.S. 127 (1903).

34. 345 U.S. 461 (1953). *But see* *Logan v. United States*, 144 U.S. 263 (1892), involving the protection of an Indian in custody from a mob, where Congressional power to make laws to secure constitutional rights was upheld.

35. 245 U.S. 60 (1917). *See also* *Harman v. Tyler*, 273 U.S. 668 (1927); *Richmond v. Deans*, 281 U.S. 704 (1930). These cases, outlawing racial zoning laws for housing, led persons to rely on the restrictive covenants finally ineffectuated in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

36. 118 U.S. 356 (1886).

37. 203 U.S. 1 (1906). This case was overturned by *Jones*: The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the thirteenth amendment irreconcilable with the position taken by every member of this Court in *The Civil Rights Cases* and incompatible with the history and purpose of

employer had discharged them. An action was brought under the fourteenth amendment and 42 U.S.C. § 1981. The Court, reversing the conviction of the white members of the mob, said it had been repeatedly held that the fourteenth and fifteenth amendments are restrictions on state action and no state action had been alleged. Moreover, the thirteenth amendment, the Court held, gave no special protection to blacks. It would be patently unconstitutional for Congress to assert power under the thirteenth amendment to safeguard all racial groups from private injury motivated by racial prejudice. The 1890 Annual Report of the Attorney-General, citing rampant lawlessness and the abridgement of constitutional rights, complained that "Federal courts have no adequate jurisdiction over these offenses."³⁸ The Report urged the States to uphold their laws in prosecuting these crimes. Even murders and mob savagery were said to be beyond the jurisdiction of the federal courts without a showing of direct state involvement.³⁹ The State itself had to be at fault before an action would lie.

This narrow and formalistic insistence upon positive and affirmative state action findings to get jurisdiction under the Constitution lasted until well after the Second World War. By this interpretation, federal powers were only incurred by positive intervention of the states.⁴⁰ If a state refused to act, federal powers could not act. Federal authority could not be a vehicle for directly initiating measures to promote the rights secured under the thirteenth, fourteenth, or fifteenth amendments.

Two stultifying effects resulted from this doctrine. First, Congress was discouraged from using its powers under the enabling sections of the amendments, even when the necessary, affirmative state action existed. And, more importantly, it effectively precluded a "positive duty" analysis of the fourteenth amendment. The states had only a negative duty not to directly revoke constitutional rights protected by the amendment by denying the exercise of those rights to persons within the state.

This, of course, set the stage for widespread passive toleration of innumerable kinds of "private" racial discrimination. As long as state legisla-

the Amendment itself. "Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled." 392 U.S. at 442-43, n.78.

38. U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL (1890).

39. *Logan v. United States*, 144 U.S. 263 (1892); *United States v. Sanges*, 48 F. 78 (C.C. Ga. 1891), *writ of error dismissed for want of jurisdiction*, 144 U.S. 310 (1892); *Ex parte Riggins*, 134 F. 404 (C.C. Ala. 1904); *United States v. Powell*, 151 F. 648 (C.C. Ala. 1907). In both *Riggins* and *Powell*, Judge Jones speaks eloquently of the frustration of the binding authority of the rule to find positive state action to bring a case before the federal courts under the fourteenth amendment. Mr. Justice Frankfurter summarized these cases in *United States v. Williams*, 341 U.S. 70, 92-93 (1951).

40. See Morris & Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1, 15 (1968).

tures did nothing, federal power to intervene was nullified, even if these private acts were so common that they constituted a community pattern and way of life. They were still constitutionally immune because "private." Thus, for almost a hundred years after the Emancipation Proclamation, black men and women were helpless to protect themselves against the injustice borne under an institutionalized racism.

In the conviction that future cases should be argued with the fullest possible care, it is time to turn our attention to a delineation of the various theories of state action that have been supported in race relations cases in the past two decades of this second phase of civil rights litigation. Added significance to this discussion is drawn from the fact that the composition of the Court has changed greatly since *Jones* was decided in 1968. The majority of seven justices voting in *Jones* was reduced, by *Moose Lodge*, to a minority of three. Future changes in Court personnel could possibly lead to a de-emphasis upon state action again.

The Seven Ways to Find State Action; or, Getting a Foot in the Door

A successful action in a race relations case must contain three essential elements: (1) proof of state involvement; (2) proof of an invasion of a litigant's constitutional right; (3) proof that the invasion of the constitutional right resulted from or in some way involved the participation of the state.

With allowance for some overlapping and the complication of multiple factors of involvement, the theories of state action found in race relations cases can be categorized under seven headings: (1) the use of the courts for judicial enforcement of private discriminatory schemes; (2) intervention by police or state officials applying statutes, not discriminatory *per se* to foster segregation; (3) financial assistance and support of institutions employing discriminatory policies; (4) the delegation to private parties or associations of public governmental functions allowing them to discriminate; (5) significant state involvement in projects or enterprises conducted on a discriminatory basis; (6) state regulation, chartering or licensing of businesses or associations that discriminate; and (7) deliberate state refusal to act in the face of widespread racial discrimination in such a way that this refusal may be construed as encouraging or authorizing private acts of racial discrimination.

1. The Use of the Courts for Private Discriminatory Schemes

As Mr. Justice Bradley observed in *The Civil Rights Cases*, the fourteenth amendment is a shield, not only against state legislation, but against "state

action of every kind."⁴¹ The use of the judicial branch of the government to enforce private discriminatory schemes, however, was first declared unconstitutional in the still controversial case of *Shelley v. Kraemer*.⁴² Some commentators have proclaimed that *Shelley* marked the demise of state action,⁴³ but it actually purported to do no such thing.⁴⁴

The case involved a suit for court enforcement of a restrictive covenant to bar a Negro from ownership of a home he had bought from a private seller. The court was asked to enforce the covenant and divest Shelley of title, revesting it in the grantor or any other person the court may choose. The Supreme Court of Missouri upheld the covenant as valid and found that its enforcement violated no rights guaranteed by the Constitution.

There was ample precedent at the time for questioning restrictive covenants in the courts. For example, in *Clifton v. Puente*, when an original grantor retook property and a Mexican-American possessor sued to evict, he could not be denied relief on the ground that the enforcing court had merely abstained from action, leaving private individuals free to impose such discrimination as they see fit.⁴⁵ In *Hansberry v. Lee*⁴⁶ the Supreme Court carefully

41. This point is too evident to need substantiation in case citation. The line-up of ordinances maintaining de jure racially discriminatory policies that have been struck down since the decision in *Brown v. Board of Education* can be found in EMERSON, HABER & DORSEN, *supra* note 9. Note most recently, the striking down of Virginia's anti-miscegenation statute in *Loving v. Virginia*, 388 U.S. 1 (1967). In *United States v. Guest*, Mr. Justice Brennan said,

The Fourteenth Amendment commands the state to provide the members of all races with equal access to the facilities it owns or manages, and the right of a citizen to the use of these facilities without discrimination on the basis of race is a basic corollary of the command.

383 U.S. 745, 780 (1966). In *Loving v. Virginia*, in striking down a Florida statute making cohabitation by a white person with a Negro a crime, Mr. Justice Stewart, concurring, said, "[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964).

42. 334 U.S. 1 (1948). See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) and the reply of Professor Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962). The most recent in a great battery of articles continuing this fundamental controversy is a very interesting study by Judge J. Skelly Wright, criticizing both Herbert Wechsler and Alexander Bickel for essentially similar reasons of what he thinks is an excessively rigid academic logic: Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 775 (1971).

43. Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323, 325 (1970). See Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CAL. L. REV. 718, 733 (1956): "If obtaining court aid to carry out 'private' activity 'converts' such private action into 'state' action, then there could never be any private action in any practical sense."

44. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

45. 218 S.W.2d 272 (Cir. App. Tex., 1949).

46. 311 U.S. 32 (1940).

avoided discussion of the constitutional issue to uphold the action of a lower court enjoining white property owners from violating a restrictive covenant.

In *Shelley*, however, the Court held judicial enforcement of such a covenant to be a violation of the 1866 Civil Rights Act. It asserted that discriminatory restrictions, if imposed by statute or ordinance, are unconstitutional. While not declaring the covenants illegal, the Court said that enforcement by the courts of such covenants is just as much state action as legislation itself.⁴⁷ But for the action of the enforcing court, a willing buyer and a willing seller would have been able to contract. The State made available the full coercive power of government to prevent that contract, thus denying petitioners their constitutional right.

Judicial action, *Shelley* held, is not immunized from the operation of the fourteenth amendment because it is pursuant to a state common law policy; nor is it exempt because a particular pattern of discrimination was arranged by private agreement. State action violative of the fourteenth amendment was found in the exertion of government authority to implement a discriminatory scheme.

Comment following *Shelley* was mixed and uncertain, though there was a prevailing immediate awareness that the extension of the state action concept to the use of the courts in adjudicating what had been considered private matters was a revolutionary turn in the law.⁴⁸

Perhaps the impact of *Shelley* was most clearly seen in *Barrows v. Jackson*.⁴⁹ There, the Supreme Court refused to permit enforcement of a claim

47. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 680 (1930), and *Virginia v. Rives*, 100 U.S. 313, 318 (1879), were both cited for the proposition that judicial action constitutes state action. The Court cited further cases wherein court action had amounted to a denial of constitutionally protected rights: *Moore v. Dempsey*, 261 U.S. 86 (1923); *Frank v. Mangum*, 237 U.S. 309 (1915); *American Fed'n of Labor v. Swing*, 312 U.S. 321 (1941); *Cantwell v. Conn.*, 310 U.S. 296 (1940) and *Bridges v. Calif.*, 314 U.S. 252 (1941).

48. Huber, *Revolution in Private Law?*, 6 S.C.L.Q. 8, 26 (1953):

It would seem, under *Shelley v. Kraemer*, that he [a Negro refused the right to rent a home] could bring suit alleging denial of equal protection of the laws. Even if the court wished to dismiss the suit as not stating a cause of action . . . it would seem that the court could not do so without supporting the discrimination.

See Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CAL. L. REV. 718, 723, 733-36 (1956); Lathrop, *The Racial Covenant Cases*, 1948 WIS. L. REV. 508, 525; Scanlan, *Racial Restriction in Real Estate—Property Values Versus Human Values*, 24 NOTRE DAME LAW. 157, 172-73 (1949). See also Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S.C. L. REV. 208, 213 (1957). For an interesting earlier study on this point, consult McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional*, 33 CAL. L. REV. 5, 30 (1945).

49. 346 U.S. 249 (1953).

for damages for breach of a restrictive covenant against one who had conveyed land to a Negro in violation of his contract. Judicial enforcement of such a contract was held to be violative of the fourteenth amendment. *Shelley* has also been extensively applied in landlord-tenant cases.⁵⁰ *Edwards v. Habib*⁵¹ involved a landlord's retaliatory eviction of tenants for reporting violations of housing code regulations. The D.C. Circuit Court held that judicial application of state common law, even in a controversy between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government. This is true even where the court is simply enforcing a privately negotiated contract. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*,⁵² a claim for damages was upheld where a racially restrictive clause in a contract had enabled a cemetery to refuse burial to the Indian husband of an Iowa widow.

A leading case in judicial enforcement of discriminatory schemes involved the trusteeship of Senator Augustus O. Bacon's will.⁵³ In 1911, Senator Bacon willed a park to the city of Macon, Georgia, to be used by whites only. The city was named a trustee on the Park's Board of Managers. While the park was segregated for many years, ultimately the city opened its use to everyone. By the time of the action, the park had become a public facility which could not be managed and maintained on a segregated basis.

An action was immediately taken to remove the city as a trustee. After several Negro citizens intervened in the suit, the city tendered its resignation. The remaining trustees and Senator Bacon's heirs asked for a reversion of the park to the Senator's estate. The Supreme Court of Georgia held that, as a matter of law, a court of equity can supervise charitable trusts so that their purpose would not fail. The bequest of property for the use of a limited class of people was held valid.⁵⁴

The Supreme Court reversed, holding not only that a city cannot enforce a racially discriminatory will,⁵⁵ but also that a public facility cannot operate on a private basis. When private individuals are endowed by the state with powers and functions governmental in nature, they become agencies or instrumentalities of the State and subject to constitutional limitations. The park's character, purpose,⁵⁶ maintenance, and control made it an integral

50. See, e.g., *Abstract Inv. Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. 2d 309 (1962).

51. 397 F.2d 687 (D.C. Cir. 1968).

52. 348 U.S. 880 (1954); see also 245 Iowa 147, 60 N.W.2d 110 (1953).

53. *Evans v. Newton*, 382 U.S. 296 (1966).

54. 220 Ga. 280, 138 S.E.2d 573 (1964).

55. See, e.g., *Pennsylvania v. Bd. of Dir. of City Trusts of the City of Philadelphia*, 353 U.S. 230 (1957).

56. See, e.g., *Public Utilities Comm'n of District of Columbia v. Pollak*, 343 U.S. 451 (1952).

part of the city's functions. Not even a court of equity could then change its character, in spite of the nature of the private bequest from which it originated.

Before *Evans*, there had been suits for declaratory judgments on the validity of reverter clauses.⁵⁷ The question, however, is whether any court can constitutionally intervene to permit a declaration of purpose, reversion, or a change of trustee, when the action is brought for the purpose of fostering discrimination. Does not all such judicial action entail enforcement and thus prohibited state action?

In the case of the *Will of Stephen Girard*,⁵⁸ the city of Philadelphia, acting through a board of trustees, had maintained a boys' training school for whites only. Even though private trustees were used, this was held to be unconstitutional under the fourteenth amendment. On remand, the Pennsylvania courts replaced the city of Philadelphia with private trustees so that Girard's dominant discriminatory purpose could be fulfilled. The Supreme Court declined to review the new arrangement. It is, of course, doubtful that such court action would be allowed today. As one commentator has noted, "[i]t would be incongruous if philanthropy, while operating with the helping hand of government and performing the same essential functions, was to be held to a lesser standard."⁵⁹

The action of the courts received increasingly careful scrutiny in cases tinged with racial implications. In *Levy v. Louisiana*,⁶⁰ the Court maintained that a state's wrongful death statute could not be construed to distinguish between legitimate and illegitimate children, if, in doing so, it denied a remedy to the illegitimates for wrong done to them in the death of their mother. In jury selection cases, carefully compiled jury lists or other devices used to exclude Negroes from jury duty in areas of high Negro population density have also been held to be evidence of impermissible state action.⁶¹

57. See, e.g., *Charlotte Park & Rec. Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956); *Shelley v. Kraemer* was held inapplicable where use of a park by Negroes created a valid reversion. The action was said to be an automatic "operation of law," not something achieved through the use of a state agency. See also *Capitol Fed. Sav. & Loan Ass'n v. Smith*, 136 Colo. 265, 316 P.2d 252 (1957).

58. 353 U.S. 230 (1957).

59. Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1010 (1957).

60. 391 U.S. 68 (1968). See also *Glonn v. Am. Guarantee & Liability Ins. Co.*, 931 U.S. 73 (1968); *In re Cager*, 251 Md. 473, 248 A.2d 384 (1968).

61. *Whitus v. Georgia*, 385 U.S. 545 (1967); *Coleman v. Alabama*, 389 U.S. 22 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967); *Whipple v. Dutton*, 391 F.2d 425 (5th Cir. 1968); *Battle v. Peyton*, 284 F. Supp. 645 (W.D. Va. 1968); *White v. McHan*, 386 F.2d 817 (5th Cir. 1967). For commentary on the conflict between the

Courts cannot, of course, give discriminatory acts of private persons the force of law. Yet, a balance must be struck to preserve the rights of liberty and property, privacy and voluntary association against the right not to have the state enforce discrimination against the victim.⁶² Instead of stressing an enabling or empowering theory to find the balance, however, it might be better to lay emphasis upon the positive and affirmative duty of the state to protect individuals in any area of official involvement.⁶³

2. Police Intervention

The sit-in cases adequately illustrate police-enforced segregation through the use of city and state ordinances that are non-discriminatory on their face. If the purpose of state and city legislative bodies in increasing punishments for criminal trespass or vagrancy is to discourage racial integration, is that motivation sufficient to render enforcement unconstitutional?⁶⁴ In *New York Times v. Sullivan*, a civil suit between private parties, Alabama courts applied state law to impose restrictions on the constitutional right of freedom of speech:

It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.⁶⁵

Indeed "every state official, high and low, is bound by the fourteenth and fifteenth amendments."⁶⁶ Whenever an officer acts beyond the scope of his authority⁶⁷ or in violation of the law,⁶⁸ he lends the authority of his position

need of high qualifications in jurors and representative cross sectioning of the population, see *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967) and *Bokulich v. Comm'r of Greene County*, 394 U.S. 97 (1969). In the following cases, it was held that the burden of proof shifts to the state to prove exclusion from jury rolls of Negroes was not the product of purposeful discrimination: *Patton v. Mississippi*, 332 U.S. 463 (1947); *Norris v. Alabama*, 294 U.S. 587 (1935); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Cassell v. Texas*, 339 U.S. 282 (1950).

62. Note Circuit Judge Wright's thoughtful observations in *Edwards v. Habib*, 397 F.2d 687, 690-96 (D.C. Cir. 1968).

63. Gilbert, *Theories of State Action as Applied to the "Sit-In" Cases*, 17 *ARK. L. REV.* 147, 161 (1963). This balancing of interests approach to the problem of state action is criticized by Lewis, *The Role of Law in Regulating Discrimination in Places of Public Accommodation*, 13 *BUFFALO L. REV.* 402, 414-18 (1964).

64. See *Henderson v. Trailway Bus Co.*, 194 F. Supp. 423 (E.D. Va. 1961); *Robinson v. Florida*, 378 U.S. 153 (1964).

65. 376 U.S. 254, 265 (1964).

66. *United States v. Raines*, 362 U.S. 17, 25 (1960).

67. *Id.* and *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Ex parte Virginia*, 100 U.S. 339 (1879).

68. *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Price*, 383 U.S. 787 (1966). See also *Monroe v. Pape*, 365 U.S. 167 (1961), where illegal search and de-

to what he does. If "he acts in the name and for the state, and is clothed with the State's power, his act is that of the State."⁶⁹ It is unconstitutional to use a state office to deprive any person of the equal protection of the laws or of those rights secured by the Constitution and laws of the United States. It is even unconstitutional for state officers to threaten or to begin proceedings to enforce, against parties affected, an unconstitutional act.⁷⁰

Discriminatory arrests were first reversed by the Supreme Court in *Yick Wo v. Hopkins* in 1886.⁷¹ A city ordinance in San Francisco against laundries in wooden buildings was applied only against Chinese to drive them out of business. Their convictions were reversed under a showing of purposeful unfairness in the application of the law. The case is similar to the rash of traffic and automobile registration violations suddenly levelled against blacks registering to vote in Selma, Alabama, in a voter registration campaign.⁷² Three cases illustrate the use of trespass convictions to discourage violations of state segregation policies.

In *Lombard v. Louisiana*,⁷³ black and white college students were refused service at a segregated lunch counter in McCrory's Five and Ten Cent Store in New Orleans. They remained at the counter until arrested for criminal trespass. A week before the sit-in, the Police Superintendent and the Mayor urged parents to restrain their children from participating in such activity, since it was "not in the community interest." The facts of the case disclosed that state policy and local custom, re-inforced by threats from city officials, induced the restaurateur to refuse service to the students. The students were subsequently convicted for trespass. The Louisiana Supreme Court affirmed on the ground that the restaurant was sufficiently private to allow the manager the right to determine which individuals would be served. The Supreme Court reversed on a showing of coercive involvement of city officials influencing the manager's conduct.

In *Peterson v. City of Greenville*,⁷⁴ blacks were arrested for trespass violations when they attempted to be served at a whites-only restaurant. The

tention by Chicago police was sufficient grounds for an action under 42 U.S.C. § 1983. These cases can be extended where the misconduct is attributable to private persons acting under the aegis of police authority. In *Williams v. United States*, 341 U.S. 97 (1951), a private detective, who had been issued a special police officer's badge to investigate thefts from a local business, beat up suspects to extort confessions. His action was held to be "under color of law." But actions of a bonding company in requiring a prisoner are not state action. *Thomas v. Miller*, 282 F. Supp. 571 (E.D. Tenn. 1968).

69. *Ex parte Virginia*, 100 U.S. 339, 347 (1879).

70. *Ex parte Young*, 209 U.S. 123, 155-56 (1908).

71. 118 U.S. 356 (1886).

72. *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967).

73. 373 U.S. 267 (1963).

74. 373 U.S. 244 (1963).

Court held that, where an ordinance makes it unlawful for owners or managers of restaurants to seat whites and blacks together, a conviction under the State's criminal processes, employed in a way which enforces the discrimination mandated by that ordinance, cannot stand. These city ordinances now, of course, are a thing of the past. Title II of the 1964 Civil Rights Act makes free access to restaurants, hotels and places of public accommodation a federally enforceable right. But, as a dissenting Justice Harlan observed, a segregation ordinance constitutes *prima facie* evidence of invalid state action, casting on the State the burden of proving that an act of racial exclusion was, in fact, a product solely of private choice. Thus, Justice Harlan is correct in saying that, after *Peterson* and even before the 1964 Civil Rights Act:

Although the right of a private restaurateur to operate, if he pleases, on a segregated basis is ostensibly left untouched, the Court in truth effectually deprives him of that right in any State where a law like this Greenville ordinance continues to exist. For a choice that can be enforced only by resort to "self-help" has certainly become a greatly diluted right, if it has not indeed been totally destroyed.⁷⁵

In *Peterson*, there was no showing of "state of mind," or proof that the restaurateur was directly motivated by the ordinance. If the primary concern of the Court had been for the defendant in the case, the actual effect of the segregation ordinance on the private proprietor would have been relevant. But the Court was equally concerned about others who might be affected by the pressure of such an ordinance on a variety of proprietors in a variety of environments.⁷⁶ In addition, if proof of motivation were required, there would have to be a showing in each specific case of the "mental urges of the discriminators." When only the proprietor can know what his "mental urges" may have been, such a pursuit of direct motivation would have rendered court action in the desegregation cases impossible.

In *Robinson v. Florida*,⁷⁷ the State Board of Health regulations, applicable to restaurants, required racially separate toilet facilities. Demonstrators responded by staging a sit-in. The protestors were convicted of criminal trespass. Reversing the convictions, the Supreme Court summarized its position:

While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any

75. *Id.* at 252.

76. Lewis, *The Sit-in Cases: Great Expectations*, 1963 SUP. CT. REV. 101, 110.

77. 378 U.S. 153 (1964).

restaurant which serves both races, burdens bound to discourage the serving of the two races together.⁷⁸

Thus, the use of trespass convictions in *Lombard*, *Peterson*, and *Robinson* to foster state segregation practices embodied in ordinances, health regulations, and official announcements is an impermissible violation of constitutional rights. Breach of the peace convictions were also reversed where the convictions were brought to break up sit-in demonstrations in states actively resisting desegregation.⁷⁹

Absent even a statute or an official declaration of state policy, custom can become so deeply engrained in the fabric of a community that it itself has the force of law. Use of police force to preserve a custom of racial segregation was rejected in *Adickes*. In *Garner v. Louisiana*, Mr. Justice Douglas commented on the force of custom as a factor in determining state involvement:

[S]tate policy may be as effectively expressed in customs as in formal legislative, executive or judicial action. . . . Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant case were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. If these proprietors also choose segregation, their preference does not make the action "private," rather than "state," action. If it did, a miniscule of private prejudice would convert state into private action.⁸⁰

Examples of this concept are readily available.

An evenly divided Court, in *Bell v. Maryland*,⁸¹ vacated trespass convictions, holding that involving the police and the courts to enforce a businessman's personal policy of racial discrimination was sufficient state action to violate the fourteenth amendment. Enforcement of personal prejudices by the courts, Justices Douglas and Goldberg wrote in urging reversal, was impermissible state involvement: "Why should we refuse to let state courts enforce *apartheid* in residential areas of our cities but let state courts enforce *apartheid* in restaurants?" Further, Mr. Justice Goldberg declared, after

78. *Id.* at 156.

79. *Garner v. Louisiana*, 368 U.S. 157 (1961); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Avent v. North Carolina*, 373 U.S. 375 (1963).

80. 368 U.S. at 178-81.

81. 378 U.S. 226 (1964). The court was divided into three judges pro, three in dissent and three abstentions. The case was remanded to determine whether dismissal of the criminal proceedings should be in order after passage of a state public accommodations law rendered the conduct no longer illegal.

legislative analysis of the fourteenth amendment, that no clear distinction exists between social and civil rights and that the states are positively obliged by the amendment to insure that all "these rights ran to Negroes as well as to white citizens."⁸²

Other types of state action tantamount to threats, intimidation or harassment without the actual use of force were declared unconstitutional in *Goldman v. Olson*⁸³ and *Dombrowski v. Pfister*.⁸⁴ In *Goldman*, the resolutions of a state senate creating an investigatory committee were held to be equivalent to "statutes." In *Dombrowski*, the Supreme Court affirmed a federal injunction restraining state prosecution threatening constitutional rights, where the Governor, police and other law enforcement agencies, and the chairman of the Louisiana Legislative Joint Committee on Un-American Activities sought to prosecute members of the Southern Conference Educational Fund as Communists.

In *United States v. Guest*,⁸⁵ involving Ku Klux Klan violence and intimidation of Negroes, where law enforcement officers spread false reports of criminal activities of Negroes to intimidate them and allowed the Klan to hold sway, it was held that the involvement of the State need not be either *exclusive* or *direct*. State action can be peripheral or the State only one of many cooperators in crime.

Courts have frequently intervened where cruel and unusual punishments are alleged to have been racially motivated⁸⁶—or rules have been arbitrarily promulgated from racial bias.⁸⁷

In sum, no state office, agency or institution may be constitutionally involved, directly or indirectly, by encouragement or design, singly or in concert with private parties in any act or scheme of racial discrimination.

3. State Financial Assistance or Support

Direct or indirect financial assistance in goods or services to institutions which follow a policy of racial discrimination is clearly an area of concern under the fourteenth amendment. Should any institution, regardless of its

82. 378 U.S. 226, 259, 305. For critical review of the opinions in *Bell*, see Paulsen, *The Sit-in Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137. In *Griffin v. Maryland*, 378 U.S. 130 (1964), the hiring of a local sheriff by a privately owned amusement park to keep Negroes off the premises was held impermissible and trespass convictions reversed.

83. 286 F. Supp. 35 (W.D. Wis. 1968).

84. 380 U.S. 479 (1965).

85. 383 U.S. 745 (1966).

86. *Beard v. Lee*, 396 F.2d 749 (5th Cir. 1968); *Weaver v. Pate*, 390 F.2d 145 (7th Cir. 1968); *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967).

87. *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968); *Donovan v. Mobley*, 291 F. Supp. 930 (C.D. Cal. 1968).

private character, be supported by the State in such a way that it may continue in operation on a segregated basis? Other areas of concern arise where indirect state assistance—tax exemptions, gratuitous state and municipal services, state-administered federally funded educational programs—contribute to give such institutions a position of economic preferment over purely private businesses. *Pierce v. Society of Sisters*⁸⁸ long ago settled the constitutional right to private education. What has yet to be decided, however, is to what extent may the State constitutionally support such private institutions where they are operated in contravention of what would be permissible in public institutions. Three broad areas of analogous application can be found in cases involving hospitals, private schools, and private housing. Since decisions in the specifications of these areas of state support are very difficult to interpret, a *caveat* is in order lest the cases be too hastily construed.

Early cases in these areas are generally found to be quite narrowly interpreted. For example, in *Johnson v. Levitt & Sons, Inc.*,⁸⁹ FHA and VA financing of homes was held insufficient state involvement. *Eaton v. Board of Managers of the James Walker Memorial Hospital*⁹⁰ held that state action was not present where Negro doctors were denied certain courtesy privileges in a hospital that received extensive grants in aid from the municipality. The leading case, however, broadening the concept of state involvement in hospitals receiving public funds is *Simkins v. Moses H. Cone Memorial Hospital*.⁹¹ Here the Fourth Circuit held that participation in the Hill-Burton program made hospitals subject to the fourteenth amendment.

Can state financial aid change the nature of an institution from private to public for purposes of the guarantee of constitutional rights?⁹² Dicta can be found regarding the private schools expressing the view that there can be no such thing as purely private education, in view of the place occupied by education in national life.⁹³ Yet in *Guillory v. Tulane Univ.*, *Browns v.*

88. 268 U.S. 510 (1925).

89. 131 F. Supp. 114 (E.D. Pa. 1955).

90. 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959). See also *Rackley v. Bd. of Trustees of Orangeburg Reg. Hosp.*, 310 F.2d 141 (4th Cir. 1962); *Thaxton v. Vaughan*, 209 F. Supp. 106 (W.D. Va. 1962), *aff'd*, 321 F.2d 474 (4th Cir. 1963).

91. 323 F.2d 959 (4th Cir. 1963). See also *Meredith v. Allen County War Memorial Hospital Comm'n*, 397 F.2d 33 (6th Cir. 1968), where discriminating physicians were sued under Section 1985 (42 U.S.C.A. § 1985(3)) for conspiracy.

92. The answer was negative in *Norris v. Mayor and City Council of Baltimore*, 78 F. Supp. 451 (D. Md. 1948), wherein relief was denied to Negroes refused entrance to the Maryland Institute for the Promotion of the Mechanical Arts, an institution declared to be private though 99 percent funded by the city and State. Similarly in *Mitchell v. Boys Club of Metropolitan Police, D.C.*, 157 F. Supp. 101 (D.D.C. 1957) a private club remained private though funded and sponsored by the city police.

93. See, e.g., *Guillory v. Administrators of Tulane University of Louisiana*, 203 F.

Mitchell,⁹⁴ *Powe v. Miles*,⁹⁵ and *Grossner v. Trustees of Columbia University*⁹⁶—all leading cases in private university education—the dicta must be distinguished from consistent holdings of insufficient state involvement to bring the private university under the fourteenth amendment.⁹⁷

There are, of course, degrees of dependence upon public funds. *Griffin v. State Board of Education*⁹⁸ held that, though the receipt of some state assistance did not automatically make private schools subject to the equal protection clause's ban on racial discrimination, such schools would be considered state instrumentalities for the purposes of the fourteenth amendment where they are "predominantly maintained" by such aid. The University of Tampa was held subject to the fourteenth amendment because its establishment was largely made possible by the use of surplus city buildings and other city land.⁹⁹

State and city contributions to private libraries,¹⁰⁰ hospitals,¹⁰¹ motels,¹⁰² and fairs,¹⁰³ be that aid directly given or indirectly in supplying land or services, have converted some private institutions into state instrumentalities.

Supp. 855, 858-59 (E.D. La. 1962), *summary judgment vacated sub nom. Guillory v. Adm'rs of Tulane Fund*, 207 F. Supp. 554, *aff'd*, 306 F.2d 489 (5th Cir. 1962).

94. 409 F.2d 593 (10th Cir. 1969).

95. 407 F.2d 73 (2d Cir. 1968).

96. 287 F. Supp. 535 (S.D.N.Y. 1968).

97. See Note, *Desegregation of Private Schools: Pursuit and Challenge*, 21 N.Y.U. INTRA. L. REV. 149 (1966).

98. 239 F. Supp. 560 (E.D. Va. 1965). This case seems directly contrary to *Norris*, *supra*. See also *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968). *Griffin* was later modified by *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968). In *Poindexter*, the same court that had decided *Griffin* decided that any financial aid was state action. "With deference, we disagree with the criterion the Court applied in *Griffin*. The payment of public funds in any amount through a state commission under authority of state law is undeniably state action. The question is whether such action in aid of private discrimination violates the equal protection clause." *Id.* at 854. See also *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

99. *Hammond v. Univ. of Tampa*, 344 F.2d 951 (5th Cir. 1965).

100. *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945).

101. *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964). Here the Fourth Circuit extended *Simkin*, *supra* note 91, to a North Carolina hospital which had not received a Hill-Burton grant. "State action" was found because the hospital was forced to obtain a license because of the state's Hill-Burton participation and such factors as tax exemption, construction subsidies, etc.

102. *Smith v. Holiday Inns of America, Inc.*, 336 F.2d 630 (6th Cir. 1964). The motel was built on land cleared through government aid to a redevelopment agency.

103. *Farmer v. Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964). The investment of city funds in Flushing Meadow Park and the use of city and state funds to build and maintain their own exhibits were found relevant to a holding that the New York World's Fair was subject to the fourteenth amendment despite the lack of any governmental contribution to the Fair's operating income.

In others, however, mere financial assistance was not enough.¹⁰⁴

Perhaps a combination of state financial assistance and administrative control is a stronger base upon which to construe significant state involvement. In *Simkins*, not only were 15 percent of the hospital's construction funds channeled through the State of North Carolina by the Hill-Burton program, but also State supervision and operating standards were closely followed.¹⁰⁵ The hospitals, then, operated

as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health.¹⁰⁶

In view of state compulsory attendance laws, accreditation, affirmative duties to promote integrated education,¹⁰⁷ and the fact that private schools participate in extensive federally-funded programs channeled through the States,¹⁰⁸ is there not sufficient state action to disallow racial segregation in private schools? Class limitations on religious grounds, as *Pierce* maintained, are not similar to such classifications on racial grounds for purposes of exemption from the obligations of the fourteenth amendment. This is particularly true under the *Jones* interpretation of §1981 and its unrestricted freedom to contract, even for private education.

In the field of public funding for housing the leading early restrictive de-

104. In *Greene v. Howard Univ.*, 271 F. Supp. 609, 613 (D.D.C. 1967) Judge Holtzoff says: "It would be a dangerous doctrine to permit the Government to interpose any degree of control over an institution of higher learning, merely because it extends financial assistance to it. . . . Such a result would be intolerable, for it would tend to hinder and control the progress of higher learning and scientific research. Higher education can flourish only in an atmosphere of freedom, untrammelled by Governmental influence in any degree." One may wonder, however, about the relationship between scientific research, academic freedom, and the "right" to discriminate on the basis of race. See Note, *Constitutionality of Restricted Scholarships*, 33 N.Y.U. L. REV. 604 (1958).

105. *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963).

106. *Id.* at 967.

107. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

108. E.g., the National School Lunch Act, 60 Stat. 233 (1946), as amended, 42 U.S.C. § 1759 (1964); the National Defense Education Act, 72 Stat. §§ 1581-90 (1958), 20 U.S.C. §§ 401-45 (1964); and the recent Higher Education Facilities Act of 1963, 77 Stat. 366 (1963), 20 U.S.C. § 714 (1964). See Abernathy, *Expansion of the State Action Concept under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 390 (1958):

It may very well be true that state financial aid alone does not render the institution receiving such aid a state agency. . . . However, a finding of state financial support plus an unusual degree of control over management and policies might properly lead to characterization of a business or agency as a state operation [I]t seems that one practical approach might be to compare the degree of control over the operation in question with the control exercised over other similar types of businesses or agencies.

cision is that of *Dorsey v. Stuyvesant Town Corp.*¹⁰⁹ New York City, having contracted with a private builder, condemned, sold, and ceded certain private land to the builder, and granted tax exemption and municipal services, all on the builder's promise to build a number of homes and limit its profits. The builder proceeded to restrict the development to whites only. In a 4-3 decision, the New York Court of Appeals held that: "The aid which the state has afforded to [the company] and the control to which [it is] subject are not sufficient to transmute [its] conduct into state action"¹¹⁰ This decision is clearly incompatible with later case law such as *Gautreaux v. Chicago Housing Authority*,¹¹¹ where the court ordered integration of public housing by scattering high-percentage black projects in white neighborhoods, and *Hicks v. Weaver*,¹¹² enjoining HUD from giving money to the Bogalusa Housing Authority because it located public housing in segregated black neighborhoods.

Can a constitutional case be built around the link with state involvement in public welfare programs, either for agencies or recipients? In *King v. Smith*,¹¹³ an Alabama "substitute father" statute was struck down because it conflicted with federal policy to aid needy children. The Court recognized an obvious fourteenth amendment problem where the law had been used in Alabama almost exclusively to deny welfare money to Negro mothers. Similarly, a Georgia regulation denying Aid to Families with Dependent Children to black women, by creating the presumption that all mothers "suitable" for field work—in most cases, black mothers—could get full employment in the growing season, was struck down as unconstitutional under the equal protection clause.¹¹⁴ Welfare recipients as wards of the State are in a special trust relationship with the State, involving a higher degree of care for their rights than for those of other private persons.¹¹⁵

109. 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

110. *Dorsey* was strongly criticized at the time by Groner and Helfeld, *Race Discrimination in Housing*, 57 YALE L.J. 426, 442 (1948) and Note: *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344, 349 (1948):

When Stuyvesant Town excludes Negroes, the effect is the same as if the eighteen blocks were zoned on racial lines. Such zoning would be prohibited if done by a state or one of its subdivisions.

111. 296 F. Supp. 907 (N.D. Ill. 1969).

112. 38 U.S.L.W. 2004 (July 1, 1969).

113. 392 U.S. 309 (1968).

114. *Anderson v. Burson*, 300 F. Supp. 401 (N.D. Ga. 1968).

115. See *Colon v. Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134 (S.D.N.Y. 1968), where welfare recipients brought a suit alleging unfair discrimination in housing and rental subsidies. This case involved the New York City Housing and Development Administration and F.H.A. Sufficient state involvement to bring it under the fourteenth amendment was found. See also *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968) and *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

Increasingly, state financial aid and support given to private institutions is being tied to close supervision of agency expenditures and programs. Thus linked, the State must be conceived as a partner with such institutions, sharing therein its constitutional obligations.

4. *Delegation of Public Governmental Functions*

Case law has developed four major areas of conspicuous sensitivity to findings of state action and responsibility in the delegation to private persons of those functions which are public and governmental in their nature. These are voting, education, union activities and general public solicitation and concourse.

The voting rights cases are particularly consistent in their findings of state action and emphasis upon the fundamental right of franchise. *Baker v. Carr*,¹¹⁶ the leading case in the line of reapportionment decisions, emphasized the duty of the states to secure fair representation in voting. It lies at the hub of a galaxy of cases beginning with state primary elections in *Nixon v. Herndon*¹¹⁷ in 1927 and *Nixon v. Condon*¹¹⁸ in 1932 and ending with the final, exasperated disallowance of poll taxes and voting tests in the most recent decisions.¹¹⁹ The cases mark a trail of dogged attempts by every conceivable ruse and deception to deny Negroes the right to vote.

The *Nixon* cases stand for the proposition that political parties are not private clubs and primary elections are part of the basic governmental processes of the States.¹²⁰ Negroes may not be constitutionally excluded from either. Delegation of authority by a state agency to private associations which deny blacks the vote was also determined to constitute illegal state

116. 369 U.S. 186 (1962). See also *Reynolds v. Sims*, 377 U.S. 533 (1964).

117. 273 U.S. 536 (1927).

118. 286 U.S. 73 (1932).

119. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Gaston County v. United States*, 288 F. Supp. 678 (D.D.C. 1968), *aff'd*, 395 U.S. 285 (1969); *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Even an impartial administration of literacy tests would perpetuate the inequities of the past. See also *Hadnott v. Amos*, 394 U.S. 358 (1969).

120. But in *Grovey v. Townsend*, 295 U.S. 45 (1935), Justice Roberts found no "state action" in a state Democratic party convention's setting qualifications to exclude Negroes from membership. Nine years later *Grovey* was overruled in *Smith v. Allwright*, 321 U.S. 649 (1944). *United States v. Classic*, 313 U.S. 299 (1941), held the right to vote includes primary elections when "the state law has made the primary an integral part of the procedure of choice. . . ." *Id.* at 318. In *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949), the attempt in South Carolina to make political parties private clubs failed. In these cases a finding of state action in state non-action was made where there is a duty to see to it that Negroes are not systematically excluded from voting. See *Perry v. Cyphers*, 186 F.2d 608 (5th Cir. 1951) regarding county and precinct primary elections.

participation in *Terry v. Adams*.¹²¹ Where a State delegates an aspect of the elective process to private groups, the decision reads, they become subject to the same restraints as the State. There is no possibility of state neutrality in withdrawing from direct involvement in such an important function as the elective process.¹²² There is no possibility either of a valid election by the use of segregated polling places or voting lists.¹²³ Under 42 U.S.C. § 1985(3), a cause of action to redress deprivation of federal voting rights lies against private individuals, even those not acting under color of law.¹²⁴

The *Brown* decision in 1954 left little doubt about the unconstitutionality of racially separate schools and school systems. Discarding *Plessy v. Ferguson*, this entire line of cases has sustained the proposition that state educational facilities that are separate are inherently unequal.¹²⁵ Patterns of tokenism to avoid compliance with *Brown* have continued throughout the nation in pupil placement plans, re-zoning of pupil attendance areas, re-transfer plans, and freedom of choice plans.¹²⁶ Systematically, these have been overturned as impermissible actions of state and local boards of education.¹²⁷ Any plan that does not positively result in integration according to the State's positive duty under the fourteenth amendment is not constitutionally permissible.¹²⁸ Even de facto segregation arising from previous patterns of illegal zoning or restrictive housing may be unconstitutional as residual effects of state action now positively to be eradicated.¹²⁹

121. 345 U.S. 461 (1953).

122. Note, *Negro Disenfranchisement—A Challenge to the Constitution*, 47 COL. L. REV. 76, 86-87 (1947); Comment, 46 MICH. L. REV. 793, 800 (1948); Note, 61 HARV. L. REV. 1247, 1248 (1948).

123. *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967).

124. *Paynes v. Lee*, 377 F.2d 61 (5th Cir. 1967).

125. Professor Larson lists sixty cases illustrative of unequal separate school facilities, see Larson, *supra* note 7, at 482-83. For extended factual analysis see also *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

126. The long and sordid history of ratios and assignments to avoid integration in the South is recorded by Justice Black in *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969). This case involved discrimination against black teachers. See also *Rolfe v. County Bd. of Educ. of Lincoln County*, 391 F.2d 77 (6th Cir. 1968).

127. E.g., *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *United States v. Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

128. *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 401 U.S. 1 (1971).

129. *United States v. School District 151 of Cook County, Ill.*, 404 F.2d 1125 (7th Cir. 1968); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). See Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U. L. REV. 285 (1965), where he says compulsory school attendance laws are sufficient state action; and Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).

Together with the right to vote and the right to education, the right to employment and the free exchange of commerce are so fundamental that significant governmental functions are involved. Thus the control of union activities has been held an important form of state involvement. "[P]ower is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by the Government itself."¹³⁰

The case is well stated by Justice Murphy, concurring in *Steele v. Louisville & N.R.R.*,¹³¹ where a union, as sole bargaining agent for employees, failed to adequately negotiate for its black members:

The constitutional problem inherent in this instance is clear. . . . While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. [I]t cannot be assumed that Congress meant to authorize the representative to act so to ignore the right guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment¹³²

Racial discrimination by unions is an unfair labor practice under Title VII of the 1964 Civil Rights Act. Unions have an obligation of good faith and fair representation to all their members.¹³³ Exclusion from work¹³⁴ or apprenticeship programs,¹³⁵ or discriminatory job classifications¹³⁶ are illegal.¹³⁷

Another related question concerns limits of a governmental function. Is it a function actually performed by government, usually performed by government or able to be performed by government?

A town like Chickasaw, Alabama, privately owned by Gulf Oil Corporation, may be so accessible and so much like any other town that the property interests of the controlling corporation must cede to constitutional restric-

130. *American Communications Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

131. 323 U.S. 192, 208 (1944). See also *NLRB v. Pacific American Shipowners Ass'n*, 218 F.2d 913 (9th Cir. 1955); *Black v. Cutter Lab.*, 351 U.S. 292 (1956).

132. 323 U.S. at 208.

133. *Local 12, United Rubber, Cork, L. & P. Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966).

134. *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

135. *Todd v. Joint Apprenticeship Committee*, 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 (1965).

136. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

137. For a discussion of remedies, see Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L.J. 457, 475 (1962).

tions.¹³⁸ Since its owners perform public functions, a shopping mall open to the public, though on private property, becomes a public place.¹³⁹ The principle is simply that, when it performs public functions, a corporation, or any private institution, may be as subject to constitutional limitations as the State itself. The corporation or institution may be a creature of the State or regulated by the State and it may possess sufficient economic power to invade the constitutional right of an individual to a material degree. The modern state establishes and depends upon the corporate system to carry out functions for which the government is responsible. The principle is unlimited because it follows corporate power wherever it exists. Instead of nationalizing the corporation, this principle constitutionalizes the function.

5. Significant State Involvement through Multiple Factors

When *Burton v. Wilmington Parking Authority*¹⁴⁰ was decided in 1961, the majority depicted any attempt at a consolidation of the state action cases as "an impossible task."¹⁴¹ Instead, the Court viewed the total factual situation to find state action when the Eagle Coffee Shoppe, run by a private lessee, violated the equal protection clause in refusing to serve a Negro. *Burton* almost defies a closely reasoned elaboration from the precedents at that time. Yet, since the decision, the rationale of broad and diversified state involvement has been used to analyze complex factual situations and find state responsibility in a number of different areas.

The Wilmington Parking Authority had been created by the city and was regulated by state law. The parking facility in which the coffee shop was located was built with revenue bonds and cash donated by the City of Wilmington. After public bidding, the Parking Authority leased the restaurant on a twenty-year lease, agreeing that it would continue to supply services and supportive maintenance. The rest of the building was to remain a public building. In fact, the *Burton* Court cited the earlier case of *Derrington v. Plummer*¹⁴² to the effect that an arms-length negotiation for a lease would leave the lessee a private entrepreneur.¹⁴³ In *Burton*, however, multiple

138. *Marsh v. Alabama*, 326 U.S. 501 (1946). See Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952).

139. *Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

140. 365 U.S. 715 (1961).

141. *Id.* at 722.

142. 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957).

143. *Derrington* turned on a "function" test, not the mere fact of leasing. State action was found because the cafeteria was located in a courthouse where its express purpose was to serve all who came into the courthouse. Other cases in this line where state action is seen in restaurants in city and federal airports are *Adams v. City of New*

state connections were made beyond the pure fact of leasing. The land and building were publicly owned; the entire entity was dedicated to "public" purposes; the construction and maintenance were partly paid for by public monies; general supervision was by a tax-exempt agency; and the profits made by the restaurant were to be paid to the State. All factors seen together made the State a participant with the restaurant owner. The Court ruled that a State may not be so involved and allow racial discrimination to occur.

Burton posed the yet unresolved question of degree or quantity of state involvement. To what extent does the fourteenth amendment draw into its purview any private contractor dealing with a state agency?¹⁴⁴ Whenever a State can prevent discrimination in any of its dealings, is there a positive obligation to do so? After *Moose Lodge v. Irvis*, the answers to these questions are, at the best, problematic.

Public facilities such as golf courses, beaches and parks operated by a State or its instrumentalities must clearly be open to all on an equal basis.¹⁴⁵ But what if a city or State sells or leases these very facilities to private persons to avoid thereby the need to integrate? Does that process of alienation absolve the State from a continuing involvement? Even before the question was mooted by the 1964 Civil Rights Act, the cases were negative.¹⁴⁶ As in *Evans v. Newton*¹⁴⁷ the web of city services, public access and function and supportive maintenance has been held sufficient to constitute state action under the fourteenth amendment.

6. State Regulation, Chartering or Licensing

Licensing or chartering a private entity to engage in business has not been held sufficient state involvement to bring the entity under the equal protec-

Orleans, 208 F. Supp. 427 (E.D. La. 1962); *Coke v. City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960); *Nash v. Air Terminal Services*, 85 F. Supp. 545 (E.D. Va. 1949). A privately leased theatre in a city hall was called a state instrumentality in *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md. 1960). Discriminating in the use of a motel and its facilities was held to be state action where the motel was located on city land (part of a municipal airport) and the city had title to improvements and the purpose of the motel was to provide facilities for the airport. *Smith v. City of Birmingham, Ala.*, 226 F. Supp. 838 (N.D. Ala. 1963).

144. See Note, 75 HARV. L. REV. 146 (1961).

145. *Mayor and City Council of Baltimore v. Dawson*, 220 F.2d 386 (4th Cir. 1955), *aff'd per curiam*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955).

146. *City of Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1957); *Easterly v. Dempster*, 112 F. Supp. 214 (E.D. Tenn. 1953); *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W. Va. 1948); *Culver v. City of Warren*, 83 N.E.2d 82 (Ohio 1948). After *Burton* and relying thereon, see *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962), *cert. denied*, 371 U.S. 911 (1962).

147. 382 U.S. 296 (1966).

tion clause. The spectrum of state licensing requirements is so broad—ranging from registration for automobiles to detailed standards of expectation and conduct for such businesses as those dispensing drugs, alcoholic beverages or public communications—that the isolated fact of licensing alone as state action would convert virtually the whole range of private businesses into state-involved entities. Yet the fact of state approval in licensing and charter approval procedures is a factor that is featured in dicta in any number of cases.

In *Lombard v. Louisiana*, Mr. Justice Douglas said of licensing where a public restaurant was in question:

There is no constitutional way, as I see it, in which a State can license and supervise a business serving the public and endow it with the authority to manage that business on the basis of *apartheid* which is foreign to our Constitution.¹⁴⁸

To the contrary in *Bell v. Marland*,¹⁴⁹ Justices Black, Harlan, and White agreed that a public restaurant owned by a private person does not become an agency of the state by licensing. They added that licensing alone cannot imply a permission of the State directed to racial relations.

In *State v. Clyburn*,¹⁵⁰ *Slack v. Atlantic White Tower System*¹⁵¹ and *William v. Howard Johnson's Restaurants*,¹⁵² licensing was held not to involve state action. The only ruling employing licensing as the basis for invoking the fourteenth amendment appears to be *Mitchell v. Delaware Alcoholic Beverage Control Comm'n.*¹⁵³ This decision was reversed on appeal,¹⁵⁴ leaving unanswered the question it raised concerning the constitutionality of a racial test in granting licenses to dealers who will not discriminate against blacks.

Licensing, together with close regulation, was found to be a "sufficiently close relation" to the State to force first amendment guarantees in the District of Columbia's public transportation system "buscasting" case—*Public Utilities Comm'n v. Pollak*.¹⁵⁵ The monopoly of street transportation enjoyed by the company, along with the fact that the public services commis-

148. 373 U.S. 267, 283 (1963). See also Douglas' earlier opinion in *Garner v. Louisiana*, 368 U.S. 157, 176 (1961), and his later opinion regarding licensing real estate agents in *Reitman v. Mulkey*, 387 U.S. 369, 385 (1967).

149. 378 U.S. 226 (1964).

150. 247 N.C. 455, 101 S.E.2d 295 (1958).

151. 181 F. Supp. 124 (D. Md. 1960), *aff'd per curiam*, 284 F.2d 746 (4th Cir. 1960).

152. 268 F.2d 845 (4th Cir. 1959).

153. 193 A.2d 294 (Del. 1963).

154. *Delaware Alcoholic Beverage Control Comm. v. Mitchell*, 196 A.2d 410 (Del. 1963).

155. 343 U.S. 451 (1952).

sion had to approve the particular actions made the actions equivalent to those of the government.

What kind of responsibility does a State have in granting a license? *Burton* maintained that "[N]o State may effectively abdicate its responsibilities by either ignoring them or merely failing to discharge them whatever the motive may be.¹⁵⁶ Can a State abdicate responsibility where it grants accreditation or imposes health and safety regulations as a prior condition to licensing? In *Commonwealth of Pennsylvania v. Brown*¹⁵⁷ general supervision of its activities by several state agencies was found relevant to a determination of whether a school for orphans had escaped the application of the fourteenth amendment by the appointment of private trustees. Perhaps the key consideration is the power of the State to review licensed activities and prevent within the scope of those activities violations of the Constitution or federal laws. The problem becomes most acute in the controversies centering around the meaning of private clubs and organizations. Private clubs and similar establishments not in fact open to the public are specifically excluded from the public accommodations title of the 1964 Civil Rights Act, and various kinds of private associations not falling within the description of public accommodations are also without coverage under the new federal legislation. It is, at this point, that our analysis returns to the new purveyor of state action, *Moose Lodge v. Irvis*.¹⁵⁸

In *Moose Lodge* the decisive factor on the district level was the unique and pervasive nature of Pennsylvania liquor regulation. The granting of liquor licenses in Pennsylvania has always been viewed as one in which the State has the fullest freedom inherent in the police power of the sovereign. The State possesses a complete monopoly over the sale and distribution of liquor within its boundaries. Limited resale is permitted for hotels, restaurants, and private clubs that possess licenses issued by the Liquor Control Board. The Board itself exercises discretionary authority in the issuance or refusal of licenses. To secure one of the limited numbers of licenses available in each municipality, an applicant must comply with extensive requirements. Once a license has been issued, the licensee must comply with many detailed requirements or risk its suspension or revocation.

The regulations of the liquor control board affirmatively require that club licenses must adhere to the provisions of their constitution and by-laws. As applied to the present case, this regulation required the local lodge to ad-

156. 365 U.S. 715, 725 (1961).

157. 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3rd Cir. 1968), *cert. denied*, 391 U.S. 921 (1968).

158. See *supra* notes 3-5 and accompanying text.

here to the constitution of the supreme lodge, and thus to exclude non-Caucasians from membership in its licensed club.

The district court held that the state action was manifest. In an area so permeated with state regulation and control, the State cannot be neutral where it requires compliance by a licensee with the discriminatory provisions of its constitution, particularly where the violation holds the threat of loss of license. The State, therefore, found itself within the ambit of actions held unconstitutional by *Burton*. The Court felt that licensing a club practicing racial discrimination collided head-on into the central purpose of the fourteenth amendment, to eliminate all official state sources of invidious racial discrimination in the State. As noted above, the Supreme Court, by a vote of 6-3, overturned the district court decision.¹⁵⁹

While the majority is patently correct in its assertion that, absent state action, private discrimination is not prohibited by the Constitution, the State's entanglement with liquor regulation—especially the licensing quota system—is not adequately met. Justice Rehnquist limits his comments on the system to the following remarks:

*The only effect that the state licensing of Moose Lodge to serve liquor can be said to have on the right of any other Pennsylvanian to buy or be served liquor on premises other than those of Moose Lodge is that for some purposes club licenses are counted in the maximum number of licenses which may be issued in a given municipality. Basically each municipality has a quota of one retail license for each 1,500 inhabitants. Licenses issued to hotels, municipal golf courses and airport restaurants are not counted in this quota, nor are club licenses until the maximum number of retail licenses is reached. Beyond that point, neither additional retail licenses nor additional club licenses may be issued so long as the number of issued and outstanding retail licenses remains above the statutory maximum.*¹⁶⁰

The crux of the problem, however, is that the quota for Harrisburg has been full for many years. Indeed, as Justice Douglas pointed out,

. . . the quota is more than full, as a result of a grandfather clause in the law limiting licenses to one per 1,500 inhabitants. There are presently 115 licenses in effect in Harrisburg, and based on 1970 census figures, the quota would be 45.¹⁶¹

The acquisition and retention of licenses, then, represents a state-operated monopoly. By allowing discriminatory practices in the exercise of the valuable state license,

159. *Id.*

160. 92 S. Ct. at 1973 [emphasis added].

161. *Id.* at 1976 n.2 (citations omitted).

the State of Pennsylvania is putting the weight of its liquor license, concededly a valued and important adjunct to a private club, behind racial discrimination.¹⁶²

The status of state-enforced private discrimination is left in a state of limbo. Observers can only wait for some further judicial definition.

7. *Deliberate Inaction by the State or Its Officers in the Face of Widespread Racial Discrimination*

Is there such a stance as state neutrality following a century of racial discrimination? Is not the inaction of the state—its refusal to take positive steps to eradicate the vestiges and scars of slavery and racial exploitation—itsself an action involving the State in the continuing denial of the equal protection of the laws? Though difficult to substantiate in particular cases by rallying the necessary contextual evidence, proof of such inaction is proof of constitutional default tantamount to state action.

In the cases emphasizing the positive duties of the State to provide for the equal protection of the laws *Reitman v. Mulkey*,¹⁶³ is clearly a focal point of analysis of those attempts at neutrality that have failed to win at court.

Since 1959, the State of California has seen three successive powerful civil rights acts—the Unruh Act of 1959,¹⁶⁴ the Hawkins Act,¹⁶⁵ and the Rumford Fair Housing Act of 1963.¹⁶⁶ The last act prohibited racial discrimination in the sale or rental of any private dwelling of more than four units. The state referendum in 1966 on Proposition Fourteen¹⁶⁷ was designed to test these acts. In the *Reitman* case, where a mixed racial couple was refused the right to rent an apartment, the constitutionality of the referendum itself, as well as its result, was tested and found wanting.

Proposition Fourteen expressly did not apply to the sale or rental of any property owned by the State or any subdivision thereof. Yet the California Supreme Court found Proposition Fourteen unconstitutional because its

162. *Id.*

163. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

164. WEST. CAL. CIV. CODE, §§ 51-52 (West Supp. 1971).

165. WEST. CAL. HEALTH AND SAFETY CODE §§ 35700-35741 (West Supp. 1971).

166. WEST. CAL. HEALTH AND SAFETY CODE §§ 35700-35744 (West Supp. 1971). The Unruh Act superseded the Hawkins Act and was enforceable by the State Fair Employment Practice Commission.

167. Section 26 of Article 1 of the California Constitution begins:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

CAL. CONST., art. I, § 26.

"immediate objective," "ultimate impact," and the "historical context and conditions existing prior to its enactment" were such that its passage resulted in the encouragement and authorization in the State of widespread racial discrimination in housing.¹⁶⁸ The conclusion that Proposition Fourteen encourages discrimination did not depend upon a showing that the private acts involved in the six cases argued simultaneously before the Court or any private action were, in fact, caused by Proposition Fourteen. The events leading to the referendum and the wording itself were held to be unconstitutional encouragement of racial discrimination.¹⁶⁹ The Supreme Court did not re-examine the factual situation, but affirmed the decision of California's Supreme Court on the assumption that the state court could best assess the total impact on the life of the State.¹⁷⁰ The Court maintained that Proposition Fourteen was more than a repealer; it was a positive encouragement to individuals to violate the right to contract of Negroes.¹⁷¹

Citing *Burton*, *Peterson*, *Robinson* and *Lombard*¹⁷² the Court held that no State can under pretense of taking a neutral stance make the right to discriminate one of the basic policies of the State.

Under the fourteenth amendment the State must seek the ideal of equality and fundamental fairness for all its citizens. The obligation of the State to favor some minorities, particularly the indigent, can be read into *Griffin v. Illinois*,¹⁷³ *Douglas v. California*,¹⁷⁴ *Gideon v. Wainwright*¹⁷⁵ and *Anders v. California*.¹⁷⁶ Inaction in all these circumstances is functional encouragement of racial exploitation. The courts have used the affirmative duty rationale in application to the fourteenth amendment only sparingly, and only in cases where discrimination could not be tolerated in matters of substantial life concern and only where the traditional state action was hard to find. There is no clear formulation of what constitutes the test as it now seems to run through the balance of *Reitman*, *Evans*, *Burton*, and *Shelley*. But the test is surely there. It is less a single act than a context of facts and circumstances, conditions and conveyed attitudes that serve to authorize, encourage, or tolerate the very racial discrimination which federal policy

168. *Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P.2d 825 (1966).

169. For a description of the political events leading to the referendum, see CASSTEVEVS, POLITICS, HOUSING, AND RACE RELATIONS: CALIFORNIA'S RUMFORD ACT AND PROPOSITION 14, 232-40 (1967). Until 1951, racial discrimination was the official policy of the National Association of Real Estate Boards. See also, 387 U.S. at 381.

170. 387 U.S. at 376.

171. *Id.* at 377.

172. *Id.* at 378, 380.

173. 351 U.S. 12 (1956).

174. 372 U.S. 353 (1963).

175. 372 U.S. 335 (1963).

176. 386 U.S. 738 (1967).

has held intolerable for these past two decades. Under the rationale of *Reitman* there is no reason why the Constitution cannot be interpreted to require the States to take positive steps in unique circumstances to protect the substantive right of equal justice and opportunity from impairment by any individual or group of individuals.

The principle that the failure of the government to act can be a constitutional violation of individual liberty was established in the leading case of *Smith v. Illinois Bell Telephone Company*¹⁷⁷ in 1926, where the failure of a state public utilities commission to act for two years on a requested rate increase was held an unconstitutional deprivation of property without due process. It was repeated in *Catlette v. United States*,¹⁷⁸ where a sheriff stood by and watched a group of irate citizens attack and break up a meeting of Jehovah Witnesses. In a race relations case, *Huey v. Barloga*,¹⁷⁹ the mob murder of a black child was laid to the charge of the trustees, employees and agents of a town who had neglected to protect persons from intimidation and violence used against them as part of a system of discrimination. The knowing neglect of the duty to protect the citizenry was itself held to be an act of discrimination violative of the equal protection clause.

Conclusion

The state action requirement of the self-executing equal protection clause of the fourteenth amendment was originally purposed to preserve a balance in the federal system through a decentralization of the administration of the national interests, among which equal protection of the laws is paramount, and some limited power to make substantive and remedial policy defining the reach of these national interests. Today, the political theory which acknowledges the duty of federal government to provide jobs, social security, medical care, and housing extends to the field of human rights. It imposes an obligation upon the federal system to promote liberty, equality, and dignity. For two decades the recognition of this duty has been the most creative force in the development of constitutional law. The recent interposition of *Adickes* and *Moose Lodge* represents, it is hoped, little more than a slight divergence in this ongoing struggle.

177. 270 U.S. 587 (1926).

178. 132 F.2d 902 (4th Cir. 1943).

179. 277 F. Supp. 864 (N.D. Ill. 1967).